

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

House Republican Campaign Committee,
Complainant,

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

vs.

Alliance for a Better Minnesota,
Respondent.

The above-entitled matter came on for an evidentiary hearing on April 19, 2010, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Steve M. Mihalchick, and Patricia J. Milun. The OAH hearing record closed on April 19, 2010.

Paul Kohls, Attorney at Law, appeared on behalf of the House Republican Campaign Committee (Complainant).

Brian Dillon, Attorney at Law, Gray, Plant, Mooty, Mooty & Bennett, P.A., appeared on behalf of Alliance for a Better Minnesota (Respondent).

STATEMENT OF ISSUE

Did Alliance for a Better Minnesota violate Minnesota Statute § 211B.06 by intentionally preparing and disseminating false campaign material with respect to Republican candidates and Minnesota House of Representatives members Kurt Zellers, Marty Seifert and Tom Emmer, that it knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06.

Based upon the entire record, including the facts stipulated to by the parties, the panel makes the following:

FINDINGS OF FACT¹

1. The Alliance for a Better Minnesota (ABM or Respondent) is a nonprofit social welfare organization that advocates in support of progressive policies and legislation.²

2. The House Republican Campaign Committee (HRCC or Complainant) is a political party unit whose primary purpose is to promote the election of Republican Candidates to the Minnesota House of Representatives.³

3. Kurt Zellers is a Republican member of the Minnesota House of Representatives and is running for re-election in November 2010. Representatives Marty Seifert and Tom Emmer are both candidates for governor and are both seeking the Republican Party's endorsement.

4. Sometime in January 2010, ABM prepared and published on various websites a "banner ad" that contains photographs of Republican Representatives Zellers, Seifert and Emmer alongside Governor Pawlenty with the text "Tim Pawlenty and his GOP Friends Took Money From Minnesota Renters. Demand Yours Back Now!"⁴

5. The HRCC contends the banner ad is false because reduction in the Renters' Credit program was not achieved through legislation but through the Governor's use of unallotment. ABM knew at the time it published the advertisement that funding for the Renter's Credit program was reduced through unallotment.

6. On March 10, 2006, Representative Marty Seifert co-authored House Files (H.F.) 1678 and 1679, bills that proposed to reduce the percentage of rent paid that could be eligible for Minnesota's Renters' Credit program.⁵

7. On May 2, 2006, Representatives Kurt Zellers, Marty Seifert and Tom Emmer each voted against a proposed amendment to H.F. 4142, which would have extended the benefits of a property tax relief bill to renters.⁶

8. On March 11, 2008, Representative Zellers co-authored H.F. 3967, a bill that proposed to reduce the percentage of rent paid that could be eligible for the Renters' Credit program.⁷

¹ Prior to the hearing, the parties agreed and stipulated to the facts set forth in the Findings. The Stipulation of Facts prepared and executed by the parties was received into evidence on the day of the hearing.

² Stipulation of Facts ¶ 16.

³ Complaint ¶ 1.

⁴ Stipulation of Facts at ¶ 1; Complaint Ex. B.

⁵ Stipulation of Facts at ¶ 35.

⁶ Stipulation of Facts at ¶ 34.

⁷ Stipulation of Facts at ¶ 33.

9. In January 2009, Governor Pawlenty recommended budget proposals for fiscal year 2010-2011. The Governor's proposals included cutting the Renter's Credit program by reducing the percentage of rent used to calculate the refund from 19 percent of rent paid to 15 percent of rent paid.⁸

10. On April 25, 2009, the Minnesota House of Representatives passed H.F. 2323, an omnibus tax bill that did not implement a cut to the Renters' Credit program as proposed by Governor Pawlenty in his January 2009 budget proposals.⁹

11. On April 25, 2009, Representatives Zellers, Seifert, and Emmer voted against H.F. 2323.¹⁰

12. House File 2323 was referred back to the Minnesota House of Representatives from a conference committee and, after it was voted on and passed again without cuts to the Renters' Credit program, Governor Pawlenty vetoed the bill on May 18, 2009.¹¹

13. On May 15, 2009, Representative Seifert was quoted in an article that ran in the *Bemidji Pioneer* as stating that the DFL legislators "sent all of the finance bills to the governor and created a \$1 billion hole, and someone needs to be the adult in the room and use the line-item veto authority given in the Constitution, along with unallotment statutes to make sure our budget is balanced as the Constitution demands."¹²

14. In July of 2009, Governor Pawlenty unallotted funding for a number of government programs, including the Renters' Credit program.¹³

15. Governor Pawlenty's unallotment of funding for the Renters' Credit program implements a reduction in funding for the program by reducing the percentage of rent used to calculate the refund from 19 percent to 15 percent of rent paid.¹⁴

16. On September 30, 2009, Representative Seifert issued a press release stating the following: "Governor Pawlenty . . . did what Minnesota Democrats cannot: He made government live within its means. Unallotment is not anyone's ideal solution, but its what the session came to when the other side proved they could not set priorities or embrace reform . . ."¹⁵

17. On December 30, 2009, Ramsey County District Court Judge Kathleen Gearin issued a temporary restraining order prohibiting the enforcement of certain

⁸ Stipulation of Facts ¶ 17.

⁹ Stipulation of Facts at ¶ 19.

¹⁰ Stipulation of Facts at ¶ 20.

¹¹ Stipulation of Facts at ¶¶ 21 and 22.

¹² Stipulation of Facts at ¶ 31.

¹³ Stipulation of Facts at ¶ 25.

¹⁴ Stipulation of Facts at ¶ 26.

¹⁵ Stipulation of Facts at ¶ 32.

unallotments implemented by Governor Pawlenty because she found his exercise of unallotment to be unconstitutional under the circumstances.¹⁶

18. On December 31, 2009, Representative Zellers issued a statement entitled “Minority Leader Zellers Responds to Unallotment Suit Ruling.” In the statement, Representative Zellers “applaud[ed] Governor Pawlenty’s leadership and his dedication to fiscal responsibility.” He also asserted that the budget dispute “deserves a solution from the legislative chambers and the Governor, not . . . an activist judge making law and ‘practice-budgeting’ from the bench.”¹⁷

19. On January 27, 2010, Representative Emmer issued a statement entitled “Rep. Tom Emmer and Republican Colleagues File Friend of the Court Brief Supporting Unallotment Authority.” The statement provided as follows: “The district court overstepped its bounds by trying to limit or question what are clearly discretionary acts of the executive branch . . . It’s a very dangerous time when the courts start inserting themselves into budget disputes between the political branches”¹⁸

20. On February 9, 2010, Representatives Emmer and Seifert joined other Republican members of the Minnesota House of Representatives in filing an *amicus curiae* brief with the Minnesota Supreme Court supporting Governor Pawlenty’s unallotments and arguing that Judge Gearin’s order should be reversed.¹⁹

21. On February 9, 2010, the HRCC filed this Campaign Complaint with the Office of Administrative Hearings.

22. ABM recently prepared and published on various websites banner advertisements containing photographs of Representatives Zellers, Seifert and Emmer with the caption, “These GOP Legislators Wanted to Cut Your Renters [sic] Credit Rebates,” alongside photographs of DFL Representatives Lenczewski and Bakk with the text: “These DFLers Lead [sic] the Effort to Stop Them.”²⁰

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...”²¹ The web advertisement prepared and disseminated by ABM is campaign material within the meaning of that statute.

¹⁶ Stipulation of Facts at ¶ 27.

¹⁷ Stipulation of Facts at ¶ 28.

¹⁸ Stipulation of Facts at ¶ 29.

¹⁹ Stipulation of Facts at ¶ 30.

²⁰ Stipulation of Facts at ¶ 4.

²¹ Minn. Stat. § 211B.01, subd. 2.

3. Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

4. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.²²

5. The Complainant has failed to demonstrate that Respondent Alliance for a Better Minnesota violated Minn. Stat. § 211B.06 by intentionally preparing and disseminating false campaign material that it knew was false or communicated to others with reckless disregard as to whether it was false.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That the House Republican Campaign Committee's Complaint against Alliance for a Better Minnesota is DISMISSED.

Dated: April 27, 2010

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

/s/ Patricia J. Milun
PATRICIA J. MILUN
Administrative Law Judge

²² Minn. Stat. § 211B.32, subd. 4.

Reported: Digitally recorded, no transcript prepared.

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.²³ Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.²⁴ Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.²⁵

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.²⁶ Based upon this standard, the Complainant has the burden at the hearing to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that it “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.²⁷

²³ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

²⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

²⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

²⁶ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

²⁷ See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), rev. denied (Minn. July 20, 2006).

The campaign material at issue in this case is an advertisement that ABM placed on various websites in January of 2010. The advertisement displayed photographs of Republican Representatives Seifert, Emmer and Zellers alongside Governor Pawlenty and under the statements: “Tim Pawlenty and His GOP Friends Took Money from Minnesota Renters. Demand Yours Back Now!”

According to the HRCC, “there is only one reasonable interpretation of the advertisement at issue in this case – that Representatives Zellers, Seifert and Emmer did something to take money from Minnesota renters.”²⁸ Because funding for the Renters Credit program was reduced by the Governor through unallotment and not by any act of the legislature, the HRCC contends the statement is factually false. The HRCC maintains that since the authority to unallot is vested solely with the governor and because there was no legislation passed and signed into law in 2009 that enacted a reduction in the Renters’ Credit program, the statement that the three Representatives pictured “took money from Minnesota renters” is false and ABM knew it was false at the time it published the advertisement.

After reviewing all the evidence and considering the arguments of counsel, the panel concludes that the statement at issue is not a false statement of fact. First, the statement that the Representatives shown in the ad “took money from Minnesota renters” is not specific enough to be factually false. Standing alone, it is not clear that the statement is referring to either the Renters’ Credit program or the unallotment of funding that reduced it. Neither of these terms are used in the statement. In order to violate Minn. Stat. § 211B.06, a statement in campaign material must be factual and capable of being proven true or false. The statement at issue here fails that test.

But even if it is assumed that the statement refers to the Renters’ Credit program, it is not a false statement of fact. The Complainant urges a hyper-literal reading of the statement focusing on the word “took.” Because that word suggests some sort of positive action on the part of the Representatives, the Complainant argues it renders the statement false since it was only Governor Pawlenty’s unilateral action that ultimately reduced the Renters’ Credit program.

The record demonstrates that Representatives Seifert, Emmer and Zellers have all taken public positions in the past in support of reducing the Renters’ Credit program and all have been vocal supporters of Governor Pawlenty’s use of unallotment to cut funding of programs in 2009. The statement is at most an unfavorable deduction based on the Representatives’ past positions and conduct. As such, it does not come within the purview of the statute.²⁹ Moreover, the statement is a fair characterization of the Representatives’ positions with respect to the Renters’ Credit program. The fact that the statement may not be literally true in every detail is not enough to support a violation

²⁸ Complainant’s Memorandum of Law at 7.

²⁹ See, *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

of Minn. Stat. § 211B.06. If the statement is true in substance, inaccuracies of expression or detail are immaterial.³⁰

The panel finds the Minnesota Supreme Court's decision in *Kennedy v. Voss*³¹ to be controlling in this matter. In that case, an incumbent county commissioner complained that his opponent disseminated literature that unfairly characterized his support for programs serving the elderly. The incumbent initially voted in favor of the county budget, which funded a variety of programs including those serving the elderly. Later he voted against the entire budget because he disagreed with one particular appropriation. After that vote, his opponent circulated literature asserting that the incumbent "is not a *supporter* of programs for the elderly."³² The incumbent maintained that there were other votes, not cited in the challenger's literature, which made the incumbent's support of the referenced programs clear. The Minnesota Supreme Court held that inferences based on the true fact of the incumbent's "no" vote, as to whether he supported particular programs, did not come within the purview of the statute.³³ The Court concluded that the public is adequately protected from extreme or illogical inferences drawn from facts by the campaign process itself.³⁴

In this case, the panel finds the Complainant's argument that the panel should find the statement to be factually false because the Representatives pictured in the ad did not literally "take money" from renters to be unavailing and one that is not supported by the case law. Like *Kennedy*, the Respondent in this matter is permitted to infer from the Representatives' statements, votes on bills, and *amicus curiae* brief, that they supported reductions in the Renters' Credit program. Saying they "took money" may be hyperbole, but it is ultimately correct to conclude these Representatives supported the funding reduction in this program.

Moreover, given that the advertisement at issue was disseminated in January, nine months before the election, Representatives Seifert, Emmer and Zellers have ample opportunity to respond directly to ABM's claims and to communicate their positions to the voters prior to the November election.

The Complainant has failed to establish by clear and convincing evidence that the Respondent violated Minn. Stat. § 211B.06. The Complaint is therefore dismissed.

K.D.S., S.M.M., P.J.M.

³⁰ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

³¹ 304 N.W.2d 299 (Minn. 1981).

³² *Id.* at 300 (emphasis added).

³³ *Id.*

³⁴ *Id.*